

10 Official Opinions of the Compliance Board 12 (2016)

- ◆ **1(A)(2) PUBLIC BODY – COMMITTEE REQUIRED BY POLICY
ADOPTED BY RESOLUTION**
- ◆ **1(C)(1) ADMINISTRATIVE FUNCTION – APPLICABLE TO
IMPLEMENTATION OF REGULATIONS BUT NOT TO
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DISCUSSION OF NON-ADMINISTRATIVE MATTER**

*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

March 29, 2016

Re: Compliance and Ethics Committee
Maryland Health Benefit Exchange, *Craig O'Donnell, Complainant*

Complainant Craig O'Donnell alleges that the Maryland Health Benefit Exchange's Compliance and Ethics Committee, a committee comprised entirely of employees of the State of Maryland, has violated the Open Meetings Act by meeting without complying with any of the Act's requirements. The Committee, by counsel for the Maryland Health Benefit Exchange ("MHBE"), responds that it was not created as a "public body" as defined in the Act and that it has operated on the assumption that it is not subject to the Act.

As we will explain below, the threshold question here is whether a committee that did not begin its life as a public body can become one later.¹ We conclude that the answer is "yes," and that the Committee has been a public body since June 15, 2015. The next question is whether the three meetings that the Committee has held since then were subject to the Act. From the information that has been provided to us, we conclude that the Committee's discussion of one agenda item at its August 11, 2015 meeting

¹ Conversely, in July 2015, we considered whether an entity that had likely once been a public body subject to the Open Meetings Act could lose that status. 9 *OMCB Opinions* 246 (2015).

was subject to the Act and that the Committee violated the Act by discussing it in a meeting not open to the public and by not making minutes of the discussion available to the public. Otherwise, the topics the Committee discussed after it became a public body appear to have fallen within the administrative function exclusion to the Act.

Facts

According to the Committee's response, the Committee was created in 2014 by MHBE's chief compliance officer to "further the process" of developing an ethics and compliance plan for MHBE and then to "provide oversight" of MHBE's compliance and ethics policies. The compliance officer assembled a group of people to perform these tasks. All were State employees.

During the first five months of 2015, the response explains, the Committee met to receive updates on "security and privacy incidents" and "external auditing activities" and to consider "privacy, compliance, and other related policies." On May 21, 2015, the Committee approved a compliance and ethics plan ("Plan") designed to ensure that MHBE's compliance program "promotes a culture of compliance and ethics while deterring criminal conduct."

In addressing its "scope," the Plan explains that "consumers and small businesses entrust [MHBE] with confidential personally identifiable information," that "federal agencies entrust [it] with highly confidential federal tax information" and that "State and Federal agencies entrust MHBE to ensure effective and efficient use of funds while minimizing fraud, waste and abuse." The Plan then defines the "Compliance and Ethics Program" as a "mechanism put in place by MHBE to achieve the goals of reducing fraud and abuse; improving operational quality; and adhering to federal and state guidelines regarding use of public funds." The Plan identifies the "Compliance Officer" as the "individual designated to serve as the focal point for the MHBE's compliance activities while overseeing and monitoring the implementation of the Compliance Program." The Plan defines the "Compliance and Ethics Committee" as "a committee established to advise the Compliance Officer and assist in the implementation of the Compliance Program." Under the Plan, the Committee comprises thirteen members who serve by virtue of their State positions—for example, the "Human Resources Manager"—and such other members as the Committee Chair designates. The response states that all of the Committee's members are State employees.

The Plan sets numerous standards to be followed by MHBE personnel in spheres such as the hiring and contracting process, handling of individuals' information, auditing and monitoring as required by the

Affordable Care Act,² and reporting violations. The Committee is to “serve[] as the oversight committee for the Compliance and Ethics Program.” Specifically, the Committee “is charged with” twelve categories of duties. Some are policy-oriented duties such as the duty to “[p]rovide guidance in the development of policies and standards related to compliance awareness, training, monitoring and response . . . to identify, avoid and/or minimize non-compliance with applicable laws, regulations and policies.” Others are oversight functions such as the duties to “[o]versee the hotline function” and “[o]versee uniform enforcement of infractions and ensure timely reporting to authorities as appropriate.” As for “risk assessment,” the Committee is to annually “prioritize risk factors, develop mitigation strategies, implement audit plans and utilize metrics to measure the effectiveness of compliance efforts.”

On June 16, 2015, MHBE’s Board passed a resolution “adopting a compliance and ethics plan for FY 2016.” Since then, the Committee has met three times: on August 11, 2015, December 16, 2015, and January 13, 2016.

Discussion

A. Whether the Committee is a “public body” subject to the Act

An entity is subject to the Act only if the entity falls within the Act’s definition of a “public body.” That definition, which appears in §3-101(h) of the General Provisions Article of the Maryland Annotated Code,³ sets forth two alternative approaches for determining whether a particular multi-member committee is a “public body.”⁴

² The Plan in fact “cross-reference[s]” nineteen sets of State and federal laws, regulations, and guidance. Perhaps informative on some of the Committee’s functions is the first on the list: “45 C.F.R. Part 155 – Exchange Establishment Standards and Other Related Standards.” One part of that regulation requires exchanges to “establish and implement operational, technical, administrative and physical safeguards that are consistent with any applicable laws (including this section) to ensure . . . [t]he confidentiality, integrity, and availability of personally identifiable information.” 45 C.F.R. § 155.260. Exchanges must also “monitor, periodically assess, and update the security controls and related system risks to ensure the continued effectiveness of those controls.” *Id.* We are not going to get into the details of these laws.

³ The statutory citations in this opinion are to the 2014 volume of that article, with the 2015 supplement.

⁴ These principles are explained in *City of Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299, 323 (2006); *see also* 9 *OMCB Opinions* 149, 150 (2014).

The first approach requires us to look to whether the entity was created by the State's Constitution, a State statute, a county or municipal charter or ordinance, a rule, resolution, or bylaw, or an executive order of the Governor or executive authority of a county or municipality. *See* § 3-101(h)(1)(ii). The fact that a committee might have started off as an informally-created group does not matter; if it is then constituted or mandated by one of the listed legal instruments, it becomes a public body. *See, e.g., 7 OMCB Opinions* 176, 184 (2011) (discussing board's reconstitution of a committee as a public body through the adoption of a resolution); *7 OMCB Opinions* 21, 27 (2010) (finding that a boundary study committee appointed by an assistant superintendent was a public body because a formally-adopted school board policy required the appointment of such committees to advise on school districting); *see also* Open Meetings Act Manual 4-5 (November 2015) (explaining the formation of public bodies by resolutions and other legal instruments). Also, for this approach, it does not matter that all of a committee's members are employed by the State; § 3-101(h)(1)(ii) contains no criterion pertaining to the members' employment. Under the first approach, we conclude that the Committee became a "public body" on June 16, 2015, when MHBE adopted a resolution that set its membership, mandated its performance of various compliance functions, and assigned it a role in making policy recommendations to MHBE.

We turn next to whether, under the second approach, the Committee was a public body before June 16, 2015. Among other things, that approach sets a criterion for the entity's membership: for the entity to be a "public body," its membership must include at least two people who are not members of "the appointing entity" or "employed by the State." § 3-101(h)(2)(i), (ii). The Committee did not and does not meet this test.

B. Whether the Committee, once constituted as a public body subject to the Act, violated the Act

As a general rule with some exceptions not applicable here, a public body's meetings are not subject to the Act if the public body is performing a judicial function, a quasi-judicial function, or an administrative function. § 3-103. Only the administrative function exclusion is potentially applicable here. The Act defines "administrative function" by what it is—the "administration" of laws, rules, regulations, or bylaws—and by what it is not—the other functions defined by the Act. § 3-101(b). Broadly speaking, "[t]he action must be administrative in character, rather than policy-making, to apply." *3 OMCB Opinions* 105, 107 (2001). If the matter discussed falls within the definition of an administrative function, "it is excluded from the Act, no matter how important the matter might be considered or how keen the public interest in it." *8 OMCB Opinions* 107, 109 (2012) (quoting *6 OMCB Opinions* 23, 25-26 (2008)); *see also 9 OMCB Opinions* 110, 112-13

(2014) (stating these principles in addressing a complaint by this Complainant about MHBE).

Often, the more closely the public body is controlled by a detailed law or regulation, the less likely it is that the public body's application of that law will involve policy making. For example, we have concluded that a public body's discussion on the details of compliance with the Open Meetings Act is administrative, because the Act itself sets the policy. 5 *OMCB Opinions* 33, 39 (2006). Likewise, the discussion is likely administrative in nature if the public body is simply applying existing policies or laws to a set of facts, as when an ethics board applies the ethics laws to a particular matter, *see Dyer v. Board of Education of Howard County*, 216 Md. App. 530 (2014), or is exercising its oversight authority over a person or entity under its authority, as when a school board supervises a principal or a school's operations. *See* 6 *OMCB Opinions* at 26; *see generally* Open Meetings Act Manual 17-19 (explaining the exclusion).

The administrative exclusion has limits. Particularly, a public body that, through formal action, has been delegated the task of making recommendations on a matter to another public body, performs an advisory function, not an administrative function, when it studies the matter and considers its recommendations. *See* § 3-101(c) (defining "advisory function"). Some of the Committee's functions, as listed in the Plan, are administrative; others appear advisory.

The Committee has provided us with "confidential" agendas of its meetings, and we will address them only in the detail necessary to this opinion. At one meeting after the Committee became a public body, it discussed a topic described as "Policy on Policy" and given a notation that the Committee would be requested to "Review New Policy." On its face, that topic was not administrative in nature, and we find that the Committee violated the Act by discussing it in a meeting that was not open to the public.

Other items were updates from the Compliance Officer on security measures and audit activities, listed as "informational." Each appears to be an exercise of the Committee's oversight over MHBE staff's implementation of policies set by existing laws and regulations and hence within the administrative exclusion. However, we are not experts in the laws and regulations that govern health benefits exchanges, and our most useful path here is not to address those laws in detail, but to give advice on how to comply with the Open Meetings Act.

Our advice is as follows: The Committee has two options. First, the Committee may hold open meetings in compliance with the Act and then close parts of those meetings if it wishes to discuss topics that fall within the statutory exceptions that permit it to exclude the public. § 3-305. If the

Committee instead recesses an open meeting to discuss an administrative matter, it must make the disclosures required by § 3-104. Second, if the meeting will pertain *only* to the administration of one of the laws that the Committee implements, *and* the discussion stays within those bounds, the Committee may deem the meeting to be administrative in nature and hence not subject to the Act. We caution that it is often hard to predict that a discussion will stay within the limits of the administrative exclusion, especially as those limits can be hard to define. Many public bodies find it useful to conduct their administrative sessions as though those sessions were subject to the Act; that way, the members can stray into advisory or other business subject to the Act. Finally, as the Committee is a public body subject to the Act, it must comply with the training provision set forth in 3-213.

Conclusion

We have concluded that the Committee has been subject to the Act since June 16, 2015 and that it violated the Act at one of the three meetings in question, with regard to its discussion of one of the items listed on that meeting agenda. We have advised the Committee on the confines of the administrative exclusion to the Act and drawn the Committee's attention to the Act's training requirement.

Open Meetings Compliance Board

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